Reserved Judgment

THE HIGH COURT OF UTTARANCHAL AT NAINITAL.

(Writ Petition (M/S) No. 421 of 2002

Pradep Singh S/O Sri Bahal Singh,
R/O F-51, Adarsh Colony, Rudrapur.

... **Petitioner.**

Versus

1. II Additional District Judge, Rudrapur,
   District- Udham Singh Nagar.
2. Nagar Palika Rudrapur, through its Executive Officers.
   Nagar Palika Rudrapur, District- Nainital
   Now Udham Singh Nagar.
3. Public Works Department, through its, Executive Engineer
   Rudrapur.
4. State of Uttaranchal through its Collector, Udham Singh
   Nagar.

... **Respondents.**

Sri S.K.Mandal, Advocate, learned counsel for the petitioner.
Sri Nand Prasad Learned Standing Counsel for the respondents.

Dated May 23, 2006

PC:
(Hon'ble B.S. Verma, J.)

Heard learned counsel for the petitioner as well as learned Standing Counsel for the respondents and perused the record.

By means of the present writ petition, the petitioner has challenged the judgment and order dated 26-4-2002 passed by the Respondent No. 1 (***Annexure No. 7***) whereby the learned Judge has rejected the application paper No. 6-C, moved under Section 5 of the Limitation Act of the appellant-petitioner to condone the delay in filing the appeal was rejected holding that no ground to condone the delay was made out by the appellant.

At the outset, it may be mentioned that the appellant-plaintiff filed a suit for permanent injunction against the Nagar Palika as well as State and P.W.D. before the Munsif, Rudrapur, which was ultimately dismissed by the Civil Judge (Jr.Division) Rudrapur holding that the suit land did not belong to

the ownership of the plaintiff-petitioner vide judgment and decree dated 4-31999. Aggrieved by the said judgment and decree, the plaintiff went up in appeal before the Additional District Judge Udham Singh. Since there was delay in filing the appeal, the case was registered as Civil Misc. Case No. 14 of 2001, Pradeep Singh Vs. Nagar Palika and others, the applicant-appellant filed an application paper no. 6-C accompanied by an affidavit duly sworn in by him under Section 5 of the Limitation Act for condonation of delay in filing the appeal. In the affidavit, the deponent had stated that after passing the impugned judgment dated 4-3-1999 which was dismissed, he had to go to his original village in Punjab, where due to land dispute amongst his brother, he had to remain there for about 2 years and after a compromise was arrived at between them he returned on 13-2-2001 to Rudrapur and contacted his counsel regarding preferring the appeal, hence a considerable had occurred in filing the appeal. It was stated that there was deliberate delay on his part as the circumstances were beyond his control. It was prayed that in case, the appeal is not heard due to delay in filing the appeal, the plaintiff was bound to suffer irreparable loss.

It appears from the impugned order passed by the appellant court that the delay was not condoned, though no objection was filed on behalf of the respondents. it appears that the order rejecting the delay condonation application was passed against the appellant-petitioner without having been objected from the side of the defendant-respondents.

In support of his contention, the learned counsel for the petitioner placed reliance in the case of ***Sri Veera Hanuman Rice and Flour Mill and another Vs. State Bank of India, Ramachandrapuram, A.P. [2000(4), A.L.R., page 87],*** In that case, there was delay of 714 days. The learned Sub-Judge dismissed the application for condonation of delay on the ground that no sufficient cause had been shown to condone the delay. The plaintiff Bank went up in revision before the High Court in C.R.P.

No. 610 of 1998/ The learned Single Judge of the Andhra Pradesh High Court allowed the delay condonation application by setting aside the order under revision on payment of costs of Rs. 2,000/- Ultimately, the matter came before the Apex Court and the Apex Court in para no. 5 has observed as under:-

"We have carefully considered the submissions of the learned counsel appearing on either side. The respondent-Bank being a Government Undertaking and since a huge sum of public money is involved, necessarily some indulgence may be shown in considering claims of parties. But, it is no justification to omit even considering the specific and relevant factual contention urged by the appellants that the Bank's lawyer was really appearing in Court regularly during those days. Since there has been such a serious omission on the part of the High Court in considering this vital aspect, we are of the view that the order of the learned Single Judge made in C.R.P. No. 610/98 could not be sustained but should be set aside and the proceedings remitted to the High Court with a direction to restore the revision on its file and consider the contention of the appellants made with reference to the appearance in Court of the Legal Advisor and the Advocate of the Bank in other case, and thereafter decide the issue afresh in accordance with law and pass appropriate orders on merit as the circumstances of the case and the materials placed on record may warrant in the opinion of the High Court. The appeal is allowed and the matter shall stand remitted to the High Court on the above terms. No costs."

I have perused the judgment of the Apex Court, wherein the facts of the case are entirely different and the case of *Sri Veera Hanuman Rice and Flour Mill (supra)* does not help the petitioner because in that case the matter was remitted to the High Court with certain directions.

So far as the facts of the present case are concerned, in this case, the application for condonation of delay was rejected holding that the applicant-appellant failed to explain certain facts regarding the date on which he went to Punjab. In the case at hand, application paper no. 6-C was filed before the appellate court on 16.2.2001 and the application under Section 5 of the Limitation Act was disposed of on 26.4.2002. The counsel for the Nagar Palika was present on that day. It comes out from the record that the application moved by the appellant-petitioner was

not opposed by way of filing any objection in writing. It appears that the averment made by the petitioner in his affidavit were not controverted by the O.P.-respondents. It is true that there has been delay in filing the appeal for about two years, but it is now well settled that the power to condone the delay is discretionary and has to be liberally construed. I am fortified in my view by the apex Court judgment of ***Apanshu Mohan Lodh and Others Vs. State of Tripura and others [(2004) 1 S.C.C., Page 119)***. In that case, there was delay of 460 days in filing the appeal on behalf of the State, which was condoned by the Division Bench of the Gauhati High Court. When the matter came before the Apex Court in appeal and plea was raised on the point of condonation of delay, then it was held that ***"this power of condonation is discretionary and has to be liberally construed."***

In the case at hand, though there is delay of almost of two years in filing the appeal, but considering the fact that the averments made by the appellant-petitioner in his affidavit remained un-controverted from the side of the defendant-respondents. In the interest of justice, I am of the view that the it will be in the fitness of things that the appeal may be decided on merits by condoning the delay in the light of the law laid down by the Apex Court in the case of ***Apangshu Mohan Lodh (supra).***

In view of above, the delay in filing the appeal by the petitioner is hereby condoned. The Respondent No.1 shall proceed to hear the appeal and decide the same on merit after admitting the same.

With the above observation, the writ petition is allowed. No order as to costs.

(B.S. VERMA, J.)

R.C.P.